

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of Petition by	)	
Continental Airlines, Inc. for a	)	
Declaratory Ruling Regarding Whether	)	
Certain Restrictions on Antenna	)	ET Docket No. 05-247
Installation Are Permissible Under the	)	
Commission's Over-The-Air Reception	)	
Devices (OTARD) Rules	)	
	)	

**REPLY COMMENTS OF  
THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.**

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## **SUMMARY**

The Air Transport Association of America, Inc. (“ATA”) submits these reply comments in support of the petition for declaratory ruling filed by Continental Airlines (“Continental”) requesting that the Commission determine that the Over-the-Air Reception Devices (“OTARD”) rules prohibit the restrictions imposed by the Massachusetts Port Authority (“Massport”) on the installation and use of antennas to create Wi-Fi hotspots at Boston-Logan International Airport. Massport and the small number of commenters that support its position have failed to demonstrate that such restrictions satisfy the heavy burden required for them to be sustained under either the public safety or “central antenna” exceptions to the OTARD rules. Instead, their comments make clear that the concern about interference that allegedly may result from Continental’s and other airlines’ use of unlicensed wireless systems in their airport lounges and other leasehold areas are unsubstantiated at best, and that the real motivation behind the restrictions is Massport’s desire to monopolize the provision of unlicensed wireless services within the airport environment for its own financial benefit.

Massport’s contentions that Continental’s and other airlines’ efforts to install and utilize wireless antennas in their leasehold areas do not fall under the protections provided by the OTARD rules must be rejected. The Commission clearly has established that the OTARD protections extend to consumer-end antennas that receive and transmit wireless signals, including unlicensed devices such as Wi-Fi access points, in airports. Massport’s series of formalistic arguments that would limit the scope of the OTARD rules disregard the underlying purposes of those rules — to promote competition and encourage the deployment of fixed wireless services, including unlicensed services. Likewise, the Commission also should reject the Airport Counsel International-North America’s (“ACI”) suggestion that airline employees and passengers located

in areas outside of airlines' customer lounges are not protected by the OTARD rules. This would be contrary to the OTARD rules and other statutory provisions that provide an independent basis for the Commission to determine that the OTARD protections apply to airlines' installation and use of fixed wireless antennas in areas that are subject to their "beneficial use."

In its attempt to defend its unlawful restrictions, Massport and its supporters argue that Massport's restrictions are valid under either the public safety or the "central antenna" exceptions to the OTARD rules. But Massport and its allies have not carried the heavy burden necessary to sustain Massport's lease restrictions under either of those exceptions. In particular, Massport has failed to identify a "clearly defined" public safety objective underlying the restrictions and has made no effort to ensure that the restrictions are either "necessary" or "no more burdensome ... than necessary." Most significantly, neither the Massachusetts State Police nor the Transportation Security Administration — the two public safety entities whose interests Massport alleges it is protecting — have filed in support of Massport's restrictions. Likewise, Massport has failed to make the required showing that its prohibition on the use of unlicensed wireless services other than those provided using its central antenna satisfies the four factors used by the Commission to sustain a landlord's efforts to require the use of such an antenna.

Finally, if the Commission were to allow Massport's restrictions to stand, it would create a dangerous precedent that would open the door to future efforts by airport authorities and landlords in other multi-tenant environments to monopolize the market for unlicensed wireless services simply by including in their leases or elsewhere generalized provisions prohibiting tenants from causing "interference" to the landlord's communications system. Such a precedent would run directly counter to the Commission's important policy objectives of facilitating the

development and deployment of advanced wireless technologies to all Americans and ensuring competition and consumer choice in the market for advanced telecommunications services.

For all of these reasons, the Commission should grant Continental's petition and declare that federal law preempts Massport's and other airport authorities' limitations on the ability of ATA's member airlines to deploy unlicensed wireless networks for their own use and use by their customers.

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**REPLY COMMENTS OF  
THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.**

The Air Transport Association of America, Inc. ("ATA")<sup>1/</sup> submits these reply comments in support of the petition for declaratory ruling filed by Continental Airlines ("Continental")<sup>2/</sup>

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<sup>1/</sup> ATA is the principal trade and service association of the U.S. scheduled airline industry. ATA members transport more than ninety percent of all passenger and cargo traffic in the United States. ATA's members are: ABX Air, Inc., Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., America West Airlines, ASTAR Air Cargo, Inc., ATA Airlines, Inc., Atlas Air, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Evergreen International Airlines, Inc., FedEx Corporation, Hawaiian Airlines, JetBlue Airways Corp., Midwest Airlines, Inc., Northwest Airlines, Inc., Southwest Airlines Co., United Airlines, UPS Airlines, and US Airways, Inc. ATA's associate members are: Aeromexico, Air Canada, Air Jamaica, and Mexicana.

<sup>2/</sup> See Petition of Continental Airlines, Inc. for a Declaratory Ruling, filed July 7, 2005 ("Continental Petition"); Supplement to Petition of Continental Airlines, Inc. for a Declaratory Ruling, filed July 27, 2005 ("Continental Supplement"). See also "OET Seeks Comment on Petition from Continental Airlines for Declaratory Ruling Regarding Whether Certain Restrictions on Antenna Installation Are Permissible under the Commission's Over-the-Air

requesting the Commission to determine that the Over-the-Air Reception Devices (“OTARD”) rules<sup>3/</sup> prohibit the restrictions imposed by the Massachusetts Port Authority (“Massport”) on the installation and use of antennas to create Wi-Fi hotspots at Boston-Logan International Airport (“Logan Airport”). Massport and the small number of commenters that support its position<sup>4/</sup> have failed to demonstrate that such restrictions satisfy the heavy burden required for them to be sustained under either the public safety or “central antenna” exceptions to the OTARD rules. Instead, their comments make clear that the concern about interference that allegedly may result from Continental’s and other airlines’ use of unlicensed wireless systems in their airport lounges and other leasehold areas are unsubstantiated at best and that the real motivation behind the restrictions is airport authorities’ desire to monopolize the provision of unlicensed wireless services within the airport environment for their own financial benefit. As ATA discussed in its comments, the Commission should grant Continental’s petition and rule that federal law preempts Massport’s and other airport authorities’ restrictions that prohibit airlines from

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Reception Devices (OTARD) Rules,” Public Notice, ET Docket No. 05-247, DA 05-2213 (rel. July 29, 2005).

<sup>3/</sup> See 47 C.F.R. §§ 1.2, 1.4000(e).

<sup>4/</sup> In addition to Massport, four airport authorities and the Airports Council International-North America filed comments in support of Massport’s position: *See* Comments of the Massachusetts Port Authority filed in ET Docket No. 05-247 (Sept. 28, 2005) (“Massport Comments”); Comments of the Tampa International Airport (Hillsborough County Aviation Authority) filed in ET Docket No. 05-247 (Sept. 28, 2005); Comments of the Phoenix Sky Harbor International Airport filed in ET Docket No. 05-247 (Sept. 28, 2005); Comments of the Manchester Airport filed in ET Docket No. 05-247 (Sept. 28, 2005); Comments of the Metropolitan Washington Airports Authority filed in ET Docket No. 05-247 (Sept. 28, 2005); Comments of the Airports Council International-North America filed in ET Docket No. 05-247 (Sept. 28, 2005) (“ACI Comments”).

installing and utilizing antennas for the reception and transmission of wireless signals for their own use, and use by their customers.<sup>5/</sup>

**I. Continental's and Other Airlines' Efforts To Install and Utilize Antennas in Their Leasehold Areas Fall Directly Within the Protections of the OTARD Rules**

Despite arguments to the contrary, there is no doubt that airlines' installation and use of antennas for the receipt and transmission of fixed wireless signals within their airport lounges and other leasehold areas fall within the protections of the OTARD rules. As ATA and others discussed in their comments, the OTARD rules clearly prohibit any non-FCC-imposed government or private restrictions on the ability to receive or transmit fixed wireless communications signals. This policy furthers the Commission's twin goals of enhancing competition and ensuring consumer choice among different telecommunications providers.<sup>6/</sup>

Although the OTARD rules initially were enacted pursuant to section 207 of the Communications Act of 1934, as amended ("the Act"), to prohibit restrictions that impair a viewer's ability to receive video programming services through personnel antennas, in 2000 the Commission made clear that the rules extend with equal force to customer-end antennas that receive and transmit fixed wireless signals.<sup>7/</sup> Moreover, just last year, Commission staff

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<sup>5/</sup> As indicated in its comments, ATA requests that any Commission ruling on Continental's petition make clear that the challenged restrictions are unlawful regardless of whether they relate to Wi-Fi or other unlicensed wireless technologies operating under Part 15 of the FCC's rules. *See* 47 C.F.R. § 15.1 *et seq.*

<sup>6/</sup> *See, e.g.,* Comments of the Air Transport Association of America, Inc. filed in ET Docket No. 05-247 (Sept. 28, 2005), at 12 ("ATA Comments"); Comments of Continental Airlines, Inc. filed in ET Docket No. 05-247 (Sept. 28, 2005), at 6 ("Continental Comments"); Comments of T-Mobile USA, Inc. filed in ET Docket No. 05-247 (Sept. 28, 2005), at 11 ("T-Mobile Comments"). *See also* First Report and Order and Further Notice of Proposed Rulemaking, *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, 22986 ¶ 3 (2000) ("OTARD First Report and Order").

<sup>7/</sup> *See OTARD First Report and Order* at 23027 ¶ 97.

reiterated — largely in response to complaints concerning efforts by Massport and other airports to restrict the ability of airlines to make use of wireless systems using unlicensed wireless spectrum within their leasehold areas<sup>8/</sup> — that the consumer protections for the installation and use of antennas under the OTARD rules apply to unlicensed devices, “*such as Wi-Fi access points.*”<sup>9/</sup> At that time, the staff made clear that the OTARD protections apply in virtually all multi-tenant environments, *including airports.*<sup>10/</sup>

Despite the undeniable fact that Continental’s Wi-Fi services at Logan Airport are precisely the type of fixed wireless services that the OTARD rules are intended to protect,<sup>11/</sup> Massport and its supporters seek to deny Continental and other airlines the benefit of those

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<sup>8/</sup> See Industrial Telecommunications Association (“ITA”), Petition for a Declaratory Ruling Concerning Legality of Limitations or Restrictions Placed Upon Airport Tenants to Operate a Wireless System (filed March 17, 2004) (“ITA Petition”).

<sup>9/</sup> See “Commission Staff Clarifies FCC’s Role Regarding Radio Interference Matters and Its Rules Governing Customer Antennas and Other Unlicensed Equipment,” Public Notice, 19 FCC Rcd 11300, at 1 (OET June 24, 2004) (“June 24<sup>th</sup> Public Notice”) (emphasis added).

<sup>10/</sup> *Id.*

<sup>11/</sup> The OTARD rules provide that “[a]ny restriction, *including ... any ... lease provision...or similar restriction*, on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property that impairs the installation, maintenance, or use of ... [a]n antenna that is ... [u]sed ... to receive or transmit fixed wireless signals other than via satellite, and ... [t]hat is one meter or less in diameter or diagonal measurement ... is prohibited to the extent it so impairs[.]” See 47 C.F.R. §§ 1.4000(a)(1)(ii)(A),(B) (emphasis added). That prohibition applies here. First, as ATA and others have correctly argued, in requiring Continental to remove the Wi-Fi antenna it has installed in its Presidents Club lounge, Massport’s lease provisions and related correspondence to Continental clearly and unambiguously impose a restriction that impairs Continental’s installation, maintenance and use of its antenna. See 47 C.F.R. § 1.4000(a)(3)(i). Second, the challenged Wi-Fi antenna was installed in Continental’s Presidents Club lounge at Logan Airport — a space that is located within Continental’s exclusive area of use or control under the May 5, 2003 Lease Agreement between Continental and Massport. See Continental Petition at Exhibit B; see also Continental Supplement ¶ 7. Third, Continental uses the antenna to receive and transmit fixed wireless signals other than via a satellite, and the antenna is a “device less than 1 meter in size.” See Continental Supplement ¶ 3.

protections by raising a series of formalistic arguments based on factual misconstructions that disregard the underlying purpose of the rules — to promote competition and encourage the deployment of fixed wireless services.<sup>12/</sup> For example, although Continental offers its Wi-Fi services to its employees and customers for free,<sup>13/</sup> Massport and ACI now argue that Continental charges a fee for its Wi-Fi services (*i.e.*, they wrongly content the Presidents Club membership fee constitutes a Wi-Fi service fee), and that as a consequence, Continental’s installation and use of its Wi-Fi antenna should not be protected by the OTARD rules.<sup>14/</sup> In support of this argument, Massport cites the Commission’s statement – taken entirely out of context – that in order to invoke the protections afforded by the OTARD rules, the equipment must be installed in order to serve only the customer on such premises and cannot be used primarily as a hub for the distribution of service.<sup>15/</sup> However, Massport’s argument would apply only in a situation where a telecommunications carrier seeks to invoke the OTARD protections to permit it to locate “backhaul and hub or relay equipment” on the premises of a customer in order to avoid “legitimate zoning regulation.”<sup>16/</sup> It is not applicable to the types of unlicensed wireless services that Continental and other airlines are seeking to provide for their own and their customers’ use at Logan Airport and other airports. Of equal importance, as ATA explained in its comments, airlines also rely with increasing frequency on fixed wireless antennas to meet

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<sup>12/</sup> See *OTARD First Report and Order*, 22983 FCC Rcd at 23027 ¶ 98.

<sup>13/</sup> Continental Petition at 3.

<sup>14/</sup> See Massport Comments at 55-56; ACI Comments at 17-18.

<sup>15/</sup> Massport Comments at 55-56.

<sup>16/</sup> See Order on Reconsideration, *Promotion of Competitive Networks in Local Telecommunications Markets*, Order on Reconsideration, 19 FCC Rcd 5637, 5644 ¶ 17 n.41 (2004) (“*Competitive Networks Order on Reconsideration*”).

their own communications needs, often without any public access whatsoever, and in some cases without any connection to the Internet.<sup>17/</sup> In fact, when examined as a whole, Wi-Fi use by airline customers accounts for only a fraction of airlines' use of unlicensed wireless services.<sup>18/</sup> Thus, the fact that Continental's pleading focuses primarily on Massport's efforts to prohibit its Wi-Fi service in its customer lounge should by no means operate to prevent the Commission from issuing the ruling that ATA and others seek.

Massport also contends that the OTARD rules should not apply in this case because the Wi-Fi services Continental is offering are not "commercial."<sup>19/</sup> But Massport cannot have it both ways: It cannot argue that Continental's installation of its fixed wireless antenna falls outside the rules because Continental only offers the service to its Presidents Club members for a fee (which ignores the use by Continental employees altogether), but then also argue that the antenna is not protected because it is not used for "commercial" services. These two arguments are internally inconsistent. In any event, Massport's attempt to argue Continental's Wi-Fi services are not "commercial" services is patently absurd. Although what Massport intends by the term "commercial" in this context is not entirely clear, its attempts to analogize Continental's Wi-Fi service to the Amateur Radio Service — a context in which the Commission has refused to preempt private lease restrictions — is unavailing. As Massport itself suggests, the Commission declined to extend OTARD-like protections to the Amateur Radio Service because it did not believe such protections were necessary to support the Commission's statutory goals of

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<sup>17/</sup> See ATA Comments at 4-5.

<sup>18/</sup> See *id.* In any event, regardless of where in the airport an airline makes use of unlicensed services, that use is arguably for the benefit of the airline's customers.

<sup>19/</sup> See Massport Comments at 59.

“promoting telecommunications competition and encouraging commercial deployment of new telecommunications technologies.”<sup>20/</sup>

Further, as ATA and others have demonstrated, Massport and certain other airport authorities have sought nothing less than to create a monopoly in the nation’s airports concerning the provision of advanced telecommunications services for their own economic gain.<sup>21/</sup> Accordingly, Massport’s efforts run completely counter to the policies that led the Commission to extend the OTARD rules to fixed wireless services in the first place. Indeed, as the Commission has previously stated, “state or local regulations that unreasonably restrict a customer’s ability to place antennas used for the transmission or reception of fixed wireless signals impede the full achievement of important federal objectives, including the promotion of telecommunications competition and customer choice and the ubiquitous deployment of advanced telecommunications capability.”<sup>22/</sup> In pursuit of these objectives, the Commission expressly prohibited the use of exclusive contracts in commercial settings because they “pos[e] a risk of limiting choices of tenants in [multi-tenant environments] in purchasing telecommunications services, and of increasing the prices paid by tenants for telecommunications services.”<sup>23/</sup>

Massport also argues that the OTARD rules should not apply to Continental’s provision of Wi-Fi service in its Presidents Club lounge because the rule “provides no protection for

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<sup>20/</sup> See *id.* at 60-61.

<sup>21/</sup> See, e.g., ATA Comments at 7-8; Continental Comments at 18; T-Mobile Comments at 15.

<sup>22/</sup> *OTARD First Report and Order*, 15 FCC Rcd at 23031-32 ¶ 107.

<sup>23/</sup> *Id.* at 22996-97 ¶ 27.

antennas installed and used only for transmission and/or reception of signals originating within a lessee's exclusive use premises."<sup>24/</sup> Once again, however, this argument enshrines the initial application of the OTARD rules to video receivers and ignores all of the Commission's reasons for extending the OTARD provisions to fixed wireless services. Although the Internet services that Continental and many other airlines provide often are available in the first instance via a T-1 or DSL line, such services do not lose the protections afforded by the OTARD rules simply by virtue of that fact. Indeed, under Massport's reasoning, the identical services *would* be protected under the OTARD rules if they were delivered in the first instance by satellite. More importantly, if the Commission were to adopt the interpretation of the OTARD rules urged by Massport, it would strip a tenant of any protection against a landlord in a multi-tenant environment who seeks to restrict the tenant's ability to utilize fixed wireless services simply because the tenant also incorporates unlicensed technologies (such as Wi-Fi) to transmit such signals within the areas covered by the tenant's lease.

Massport contends that the Commission should not enforce the OTARD rules in this case because "[n]one of the FCC's orders appear[s] to enforce the [rules] in a governmental building, and the FCC has openly questioned the applicability of competitive access requirements in general for airports."<sup>25/</sup> By their very terms, the OTARD rules expressly make illegal "[a]ny restriction, including but not limited to any *state or local law or regulation*" that impairs a party's installation, maintenance or use of a fixed wireless antenna in areas within its leasehold interest.<sup>26/</sup> The rules thus specifically target the type of state or local governmental restriction at

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<sup>24/</sup> Massport Comments at 61-62.

<sup>25/</sup> See *id.* at 64.

<sup>26/</sup> See 47 C.F.R. § 1.4000(a)(1)(i) (emphasis added).

issue here.<sup>27/</sup> Also, the Commission has specifically identified airports as falling within the protections of the OTARD rules before.<sup>28/</sup>

For similar reasons, the Commission should reject Massport's request for a special exemption from the OTARD rules similar to that it has granted to universities with respect to students residing in dormitories. Airports bear none of the characteristics of a university dormitory, in which a student possesses only limited and short-term occupancy rights incidental to his or her status as a student of the university. Quite the contrary, airport leasing arrangements, which are often long-term between airport authorities such as Massport and airlines such as Continental, vest the airlines with extensive leasehold rights exactly of the type that fall within the OTARD protections. Indeed, as the Commission specifically noted when it exempted university dormitories from the requirements of the OTARD rules, the rule still remains that where "the relationship between a university and a viewer bears sufficient attributes of a commercial landlord-tenant relationship (*e.g.*, where a university leases a single family home to a faculty member), [the OTARD] rules will apply."<sup>29/</sup>

The Commission should similarly discount ACI's suggestion that the Commission refrain from granting Continental's petition on the theories that "[p]rivate parties operating in close

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<sup>27/</sup> It is longstanding precedent that airport authorities, including Massport, are creations of local or state legislatures and thus are to be treated as governmental entities. *See, e.g., Capital Leasing of Ohio, Inc. v. Columbus Mun. Airport Auth.*, 13 F. Supp. 2d 640, 643 (S.D. Ohio 1998) (An airport authority "is a governmental entity created ... by the City of Columbus, pursuant to the laws of Ohio."); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 825 F.2d 367, 368 (11th Cir. 1987) (An airport agency that owns and operates an airport is a "local governmental agency created by the Florida legislature.").

<sup>28/</sup> *See* June 24<sup>th</sup> Public Notice at 1.

<sup>29/</sup> *See* Second Report and Order, *Implementation of Section 207 of the Telecommunications Act of 1996*, 13 FCC Rcd 23874, 23889 ¶ 29 n.73 (1998) ("*OTARD Second Report and Order*").

quarters should be left free to work out disputes over the use of unlicensed frequencies” and “contractual mechanisms are perfectly appropriate mechanisms for such arrangements.”<sup>30/</sup> Such a suggestion does nothing more than whitewash the actual experiences that ATA’s members have had and continue to have across the country as airport authorities exercise their unique market power to control the provision of wireless broadband and other unlicensed wireless services in order to establish an additional revenue source. If anything, airlines arguably are *more* in need of the OTARD protections than other types of tenants, as they have very little bargaining power to enable them to “work out disputes” with the airport authority since they have no alternative but to remain as airport tenants. Moreover, the lease restrictions at issue give the airlines no bargaining position because the airport has unbridled discretion to approve or not approve the installation of an antenna.<sup>31/</sup> Thus, faced with the blatantly monopolistic lease provisions and the position that use of a central antenna is the airlines’ only acceptable alternative, the airlines’ only recourse is to seek relief at the Commission from the airports’ efforts to eliminate any form of telecommunications competition in the airport environment.

Finally, Massport contends that “[t]he OTARD rule grants no protections to Presidents Club members” because “Continental has not followed the requisite procedures for obtaining Massport’s prior written approval for a sublet of the Presidents Club.”<sup>32/</sup> This statement flatly ignores the Commission’s unambiguous statement that the OTARD protections apply not only to tenants using an antenna to receive service for their own use, but also to those seeking to provide

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<sup>30/</sup> See ACI Comments at iii.

<sup>31/</sup> See Massport Comments at Exhibit A § 9.8.

<sup>32/</sup> *Id.* at 65-66.

service to others for a fee.<sup>33/</sup> It also completely disregards the fact that, as ATA explained at length in its comments, Continental and other airlines use unlicensed wireless services not only to provide services to their customers, but for their own use as well.<sup>34/</sup> More troubling, however, is that Massport's position suggests it — and not the Commission — retains the authority to “balanc[e]...competing interests” and “manage critical spectrum resources.”<sup>35/</sup> This obviously is not the case in any multi-tenant environment, including an airport, since the Commission alone possesses the authority to allocate spectrum for particular uses and determine who should and should not have access to it.

## **II. Massport Has Failed To Make the Necessary Showing To Satisfy the Limited Public Safety Exception to the OTARD Rules**

Massport and its supporters also have failed to make a sufficient showing that the lease restrictions it has sought to impose on Continental are justified under the very narrow public safety exception to the OTARD rules. Specifically, as discussed below, Massport has failed entirely to identify any “clearly defined” public safety objective to support the challenged

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<sup>33/</sup> See, e.g., June 24<sup>th</sup> Public Notice at 3 (stating that “the protections apply to certain kinds of wireless technologies where customer-end antennas also function to relay service to other customers.”) (citation omitted).

<sup>34/</sup> ATA Comments at 4-5. For similar reasons, the Commission should disregard ACI's suggestion that “Continental has asked OET to put the interests of a handful of Continental's customers...ahead of the interests of thousands of other travelers who pass through Logan every day.” See ACI Comments at i. As ATA made clear in its comments, in addition to providing Wi-Fi services to their customers, airlines make extensive use of unlicensed wireless services for their own internal business and safety needs.

<sup>35/</sup> See Massport Comments at 4, 20.

restrictions, and has made no effort to ensure that the restrictions are either “necessary” or “no more burdensome ... than necessary,” as required by the rules.<sup>36/</sup>

Massport states that the restrictions it has sought to impose on Continental’s use of unlicensed wireless services are justified under the OTARD rules “because the proliferation of individual Wi-Fi antennas at Logan [Airport] would interfere with the vital safety and security communications operating on [AWG’s] Wi-Fi antenna system.”<sup>37/</sup> In support of its suggestion regarding possible interference, however, Massport cites only to a post-petition study conducted by a third-party consultant (paid by Massport) who concluded that there were a small number of “competing signals” that could be detected at certain locations within the airport.<sup>38/</sup> In addition, the consultant noted similar “interference” resulting from microwave ovens and baggage conveyor belts operating in the airport.<sup>39/</sup> By categorizing such competing signals as “interference,” Massport effectively ignores many of the technical standards that apply to Wi-Fi and other unlicensed wireless systems. In particular, because 802.11 systems operate using a carrier sense multiple access (“CSMA”) scheme, as a technical matter, co-channel Wi-Fi access points do not interfere with each other, because by design they effectively share the total available throughput capacity. More importantly, as Massport’s comments make clear, it believes that objectionable interference exists if there are *any* competing signals in the same

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<sup>36/</sup> Under the OTARD rules, restrictions on the installation, maintenance, and use of an antenna only are permitted where they are “necessary to accomplish a clearly defined, legitimate safety objective” and are “no more burdensome to affected antenna users than is necessary” to achieve that objective.” *See* 47 C.F.R. § 1.4000(b)(1),(3).

<sup>37/</sup> *See* Massport Comments at 39.

<sup>38/</sup> *See id.* at 50-61, Exhibit B.

<sup>39/</sup> *See id.* at Exhibit B, page 31.

unlicensed spectrum band.<sup>40/</sup> But this is not the definition of “interference” to which the Commission adheres in the context of unlicensed spectrum, which by its very nature supports multiple users and provides *no* exclusive operating rights. Instead, FCC rules and decisions define “harmful interference” as interference that “endangers the functioning of a radio navigation service or of other safety services or seriously degrades, obstructs, or repeatedly interrupts a radiocommunications service operating in accordance with [FCC rules].”<sup>41/</sup> Massport has not shown, and cannot show, that such harmful interference exists.

Far from being clear and specific, Massport’s vague reference to “competing signals” more closely resembles the type of generalized public safety objectives that the Commission in prior applications of the OTARD rules has held are invalid.<sup>42/</sup> In *Star Lambert*, for example, the Commission determined that a general statement of “health, safety and welfare interests” did not provide the type of specific guidance and clear purpose that is required by the OTARD rules.<sup>43/</sup>

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<sup>40/</sup> See *id.* at 48.

<sup>41/</sup> See 47 C.F.R. § 15.3(m).

<sup>42/</sup> Massport also has failed to demonstrate that its purported public safety objective is stated in the text of the restriction or otherwise readily available to affected antenna users, as required under the OTARD rules. Instead, the purported safety objective in the lease provision is vague and open to different interpretations. Specifically, the lease provision, and the lease itself, fails to provide a clear definition for the term “interfere.” Massport also refers to other private documents as “readily available” sources of the safety objective. Specifically, Massport points to two Amendments to the original Lease Agreements, which Massport attached to its comments as exhibits. See Massport Comments at 41; see also Massport Comments at Exhibits D & E. But, ATA was unable to find any reference to safety objectives in either of these Amendments. Further, Massport points to, but failed to submit, an “Operating Agreement” and an “Emergency Procedure Manuals for Logan” as further sources of its purported safety objective. See *id.* at 41-42. Because Massport failed to attach these documents to its comments, there is no way to ascertain whether, as Massport contends, the purported safety objectives appear, let alone are clearly defined, in these documents.

<sup>43/</sup> See Memorandum Opinion and Order, *Star Lambert and Satellite Broadcasting and Communications Ass’n of America*, 12 FCC Rcd 10455, 10469 ¶ 36 (1997).

This is not surprising, however, since Massport's reliance on the possibility of "interference" to prohibit airlines such as Continental from installing their own unlicensed wireless systems in fact is nothing more than an effort to regulate the use of the radio spectrum at Logan Airport — a power that under the Act rests solely with the Commission — and create a valuable monopoly on the provision of unlicensed wireless services.<sup>44/</sup>

Nor have Massport's actions to restrict Continental's and other airlines' use of unlicensed wireless services within their leasehold areas been "no more burdensome" than necessary to serve Massport's purported public safety objective. For these restrictions to be "no more burdensome to affected antenna users than is necessary" they would have to be the *only* means available to Massport to address its interference concerns. As Massport itself acknowledges, however, there are technologies and procedures currently in use that can effectively mitigate interference in environments where there is more than one device operating in the same unlicensed spectrum band.<sup>45/</sup> These mitigation techniques — including channel mapping, dynamic frequency selection, adaptive power control and other power management techniques, judicious placement of antenna beams and nulls, adaptive frequency hopping, and the use of alternative spectrum — can allow myriad users to co-exist in the same spectrum environment

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<sup>44/</sup> In fact, as Continental explained in its petition, Massport initially did not assert *any* public safety rationale as a basis for prohibiting Continental's provision of Wi-Fi services at Logan Airport. *See* Continental Petition at Exhibit A. American Airlines similarly has indicated that Massport's actions appear to be driven solely by financial interests. *See* Comments of American Airlines, Inc. in ET Docket No. 05-247 (filed Sept. 28, 2005) at 2 ("American Comments") (stating that in meetings and discussions with Massport regarding Massport's efforts to prohibit American from providing unlicensed wireless services at Logan Airport "Massport consistently made clear that its concerns were commercial in nature, and that its demands and actions vis-à-vis American were driven by its decision to award an exclusive contract to AWG.")

<sup>45/</sup> *See* Massport Comments at 23-25.

without causing unacceptable interference to each other. Further, Massport appears to have omitted from its analysis of potential interference concerns the role that advanced technologies such as “smart antennas” might play as an alternative to pursuing an outright prohibition on airlines’ deployment of their own unlicensed wireless systems. Such antennas allow users to “focus their radio transmissions according to the geographic locations of their users,” “permit greater re-use of the same radio frequencies,” and enable “[wireless Internet service providers] to pattern coverage areas in a way that will best suit the needs of their customers.”<sup>46/</sup> Such technologies could be used by AWG and individual airlines, if truly necessary, to limit potential interference with others’ operations at Logan Airport.<sup>47/</sup> Massport’s suggestion that these techniques would “not adequately resolve” its interference concerns or “provide the same advantages as RF management through [its] central Wi-Fi antenna system”<sup>48/</sup> are untested at best, and, more importantly, completely fail to support Massport’s contention that the restrictions are “no more burdensome than necessary,” as required under the OTARD rules.<sup>49/</sup>

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<sup>46/</sup> The Commission itself has promoted the use of “smart antennas” as a means of providing “increased spectrum efficiency.” See “Connected & On the Go: Broadband Goes Wireless,” Report by the Wireless Broadband Access Task Force, FCC, Feb. 2005, at 53 (“Wireless Task Force Report”).

<sup>47/</sup> *Id.* In fact, many airlines successfully have coordinated their use of unlicensed spectrum in the airport environment using such technologies so as to reduce the likelihood that they will harmfully interfere with each other.

<sup>48/</sup> See Massport Comments at 23.

<sup>49/</sup> Despite Massport’s arguments otherwise, the existence of the central antenna and the Tenant Approval Application (“TAA”) process do nothing to diminish the overly burdensome nature of Massport’s restrictions. As explained in the Lease Agreement, Massport’s approval of Continental’s application to install a wireless antenna “may be withheld, granted or conditioned upon factors which [Massport] determines *in its sole discretion* has had or may have an impact upon [Massport], the Airport, its efficient or productive operation....” See Massport Comments at Exhibit A § 9.8 (emphasis added). Thus, the TAA process is so subjective that it in no way ensures that a tenant has any real opportunity to install and use its own antenna.

In any event, the fundamental hurdle that Massport faces in relying on the public safety exception to the OTARD rules is that, by its very nature, the unlicensed spectrum on which AWG, Continental and other airlines operate their unlicensed wireless systems is subject to some level of interference.<sup>50/</sup> As a result, relying on unlicensed spectrum for mission critical or safety-of-life communications is not appropriate because of the unavoidable possibility of interference from other licensed and unlicensed users. Indeed, in designing their own unlicensed wireless systems, most airlines have established appropriate backup systems or procedures — including networks that rely on dedicated spectrum or wireline connections, and which thus are not subject to interference — to ensure that their own critical communications needs are always met. In their rush to monopolize the market for unlicensed wireless services for their own financial benefit, Massport and certain other airport authorities appear unwilling to put in place similar procedures.

As the Commission has made clear, while “license-exempt spectrum may be used in supplementing public safety systems,” in the long-term “the need for dedicated spectrum for public safety will remain.”<sup>51/</sup> This reliance on licensed spectrum makes sense because “public safety entities — and particularly, first responders — require unfettered and immediate access to voice and data critical to address an emergency,”<sup>52/</sup> and such access is only available when

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<sup>50/</sup> See, e.g., 47 C.F.R. § 15.5(b) (“Operation of an intentional, unintentional, or incidental radiator is subject to the conditions that no harmful interference is caused and that interference must be accepted that may be caused by the operation of an authorized radio station, by another intentional or unintentional radiator, by industrial, scientific and medical (ISM) equipment, or by an incidental radiator.”).

<sup>51/</sup> Wireless Task Force Report at 40.

<sup>52/</sup> *Id.* at 39.

relying on licensed, exclusive use spectrum.<sup>53/</sup> Massport, however, has failed to show that *any* public safety entity is currently using the AWG central antenna at Logan Airport in support of its contention that the restrictions it has imposed on Continental and other airlines are justified under the public safety exception to the OTARD rules.<sup>54/</sup> That no public safety entity has supported Massport on this point suggests that the same public safety entities that Massport is purportedly protecting understand that by its nature unlicensed spectrum is subject at all times to interference from other unlicensed and licensed users. Indeed, the stark absence of any submission in the record by public safety officials in support of the restrictions clearly casts doubt on the extent to which those efforts are intended to benefit public safety users, instead of simply monetizing a valuable monopoly for Massport.

Although ATA does not dispute that the use of unlicensed spectrum can be beneficial to public safety entities, the public interest would not be served by taking actions that limit competition among wireless telecommunications providers in the unlicensed spectrum bands solely because unlicensed devices can aid public safety officials in their duties. The Commission should be very leery of efforts by Massport and other airport authorities to rely on unproven dangers of potential “interference” to restrict or outright prohibit airlines from making use of unlicensed wireless technologies. In particular, as the uses of unlicensed spectrum for Wi-Fi and

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<sup>53/</sup> See *id.* at 39-40. Indeed, Massport itself acknowledges that “public safety agencies have traditionally employed licensed private radio systems” for their communication needs, and they “still use their licensed frequencies for mission-critical operations...” See Massport Comments at 43, 24. And as ATA noted in its comments, the unlicensed spectrum used to support Continental’s and other airlines’ Wi-Fi and other unlicensed wireless systems is not the same or even adjacent to the public safety frequencies that the FCC has allocated specifically for use by public safety licensees, including those serving Logan Airport. See ATA Comments at 16.

<sup>54/</sup> Similarly, as ATA noted in its comments, to date there is no evidence that any public safety officials at Logan Airport have informed Continental of any interference to their wireless systems resulting from Continental’s Wi-Fi operations. See ATA Comments at 16.

other advanced wireless services continue to expand, allowing a landlord to invoke the public safety exception to the OTARD rules based on “interference” in order to take advantage of inherent monopoly power to control unlicensed wireless services would result in a significant paring back of the consumer protections the Commission sought to ensure when it extended the OTARD rules to fixed wireless services in the first place. As ATA discussed in its initial comments, this also would have the practical effect of allowing a landlord to create an exclusive license for use of public airways that the Commission has expressly allocated for “unlicensed” use.<sup>55/</sup>

### **III. Massport’s Restrictions Do Not Fall Within the Central Antenna Exception to the OTARD Rules**

Massport and ACI also have failed to make the requisite showing that Massport’s restrictions on Continental’s provision of Wi-Fi services meet the requirements of the “central antenna” exception to the OTARD rules. Under this exception, Massport bears the burden of proving that its installation of a central antenna, when combined with its restrictions on the installation of individual antennas, “does not impair installation, maintenance, and use” of an

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<sup>55/</sup> As ATA explained, the Commission has designated certain spectrum bands (including the spectrum on which Wi-Fi and many other wireless technologies operate) for unlicensed operations, and — in lieu of granting licenses that permit the exclusive use of the spectrum by a single user — has enacted rules to prevent or minimize radio frequency interference among all users and equipment operating on such spectrum. Under these rules, the equipment used by ATA’s members to run their unlicensed wireless networks must (1) meet certain technical standards, (2) accept whatever interference is received from other devices, and (3) correct whatever interference may be caused to other devices. *See* 47 C.F.R. §§ 15.1 *et seq.* The Act and those regulations clearly preempt any attempt by an airport authority (or other governmental entity other than the Commission) to enact rules or regulations that prohibit certain users from operating on unlicensed frequencies and in effect create an exclusive spectrum license. *See* ATA Comments at 11.

antenna.<sup>56/</sup> In making this showing, Massport must demonstrate that: (1) Continental can receive all of the fixed wireless services it desires and could receive with its own antenna (including services from the service provider of Continental's choice); (2) the signal quality of the central antenna is of an acceptable quality, as good as, or better than, the quality that Continental could receive from its own antenna; (3) the costs associated with the use of the central antenna are no greater than the cost of installation, maintenance and use of Continental's antenna; and (4) the requirement that Continental use the central antenna instead of its own antenna does not unreasonably delay Continental's ability to receive fixed wireless services.<sup>57/</sup>

As an initial matter, Massport's generalized statements that Continental's employees and passengers "could likely receive the same business services"<sup>58/</sup> and "could likely receive service from [their] choice of providers"<sup>59/</sup> is far from sufficient to carry its burden of demonstrating that Massport's central antenna permits Continental to receive wireless services from the provider of its choice. Instead, Massport's complicated assertions regarding Continental's and its customers' methods of accessing the Internet are nothing but an effort to obfuscate the obvious truth that if the Commission were to uphold Massport's requirement that all airlines utilize its central antenna, the only service provider to which the airlines will have access is AWG. For similar reasons, Massport's reliance on the fact that Continental's employees who "appear to use

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<sup>56/</sup> Order on Reconsideration, *Implementation of Section 207 of the Telecommunications Act of 1996*, 13 FCC Rcd 18962, 18998 ¶ 86 (1998) ("OTARD Order on Reconsideration").

<sup>57/</sup> *Id.* at 18999 ¶ 88.

<sup>58/</sup> Massport Comments at 29.

<sup>59/</sup> *Id.* at 29-30.

Fiberlink for remote access to the corporate network,”<sup>60/</sup> could continue to do so using the central antenna is misplaced. Under the OTARD rules, as described above, Massport must demonstrate that Continental and other airlines can obtain fixed wireless services from the provider of their choice – not simply that their current remote access provider may still be available to them.<sup>61/</sup>

Massport has also failed to provide any concrete evidence that its central antenna provides a signal quality of transmission that is “as good as, or better than” that which Continental has received and would receive from use of its individual antenna. Instead, Massport simply states, without any basis for comparison, that its central Wi-Fi antenna “should provide” Continental and its passengers with an acceptable wireless signal quality.<sup>62/</sup> In fact, this statement is contradicted by Massport’s own admission that “[a] recent engineering audit has revealed that the central Wi-Fi antenna system provides a slightly weaker signal than Continental’s Wi-Fi antenna in a corner of the President’s Club.”<sup>63/</sup> More importantly, Massport’s suggestion that the central antenna is preferable to the antennas being used by Continental and other airlines is flatly contradicted by the fact that most airlines have indicated that they would prefer not to use the central antenna, or would prefer to use it for only a subset of their wireless needs. For example, American Airlines, Delta Air Lines and United Airlines each

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<sup>60/</sup> See *id.*

<sup>61/</sup> In addition, in many cases it is technologically impossible for an airline to have all of its wireless needs met through an airport authority’s common antenna. For example, often an airline has distinct network security requirements and protocols that are standardized across all airports in which the airline operates. There can be no guarantee that an airport’s central antenna can support those requirements, and there is no incentive for the airport authority to ensure that it can.

<sup>62/</sup> *Id.* at 33.

<sup>63/</sup> See *id.* at 35.

have selected T-Mobile USA — and not AWG — as their provider of Wi-Fi services for their airport clubs and lounges at Logan Airport.<sup>64/</sup>

Massport’s unsupported contention that its central antenna is likely to be less expensive than if Continental were allowed to continue to use its own individual antenna also is misplaced. In its comments, Massport describes four alternatives for permitting access to Wi-Fi services provided over the central antenna, none of which can be shown to be less expensive than the services provided using Continental’s antenna, and all of which result in increased revenues for Massport.<sup>65/</sup> The first two alternatives require the user to pay AWG by credit card or purchase a prepaid/promotional AWG usage card from an airport vendor at a rate of \$7.95 for 24 hours of access.<sup>66/</sup> For Continental’s employees and preferred customers — who currently obtain Wi-Fi access free of charge — these options clearly are more expensive than obtaining service from Continental’s Wi-Fi antenna. In addition, even to the extent airlines do choose to charge their customers for Wi-Fi access, adding the unnecessary middleman layer that AWG represents would quite likely add to the costs of the service. As a third alternative, Massport allows users that have an existing account with one of Massport’s “authorized” service providers or partners to access the central antenna.<sup>67/</sup> Massport has not provided any evidence about the costs for this method of access, but it goes without saying that this alternative would cost Continental’s

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<sup>64/</sup> See, e.g., American Comments at 1-2.

<sup>65/</sup> Not surprisingly, Massport freely admits that regardless of which method of access is used, “AWG and Massport receive a portion of the revenues from wireless Internet access service.” Massport Comments at 19 n. 44.

<sup>66/</sup> Massport Comments at 19.

<sup>67/</sup> *Id.* Not surprisingly, each of the “authorized” service providers appears to have a pre-existing relationship with AWG. *Id.*

employees and passengers more than they currently pay because as a general matter “pre-arranged accounts” require up front payment of subscription fees. As a fourth alternative, Massport states that users can gain access to the central antenna for free as “customers of tenants that have an agreement with AWG.” Once again, this alternative would clearly cost Continental’s employees and customers something, which is more than they would pay to use Continental’s own antenna. Finally, to the extent an airline offers its customers a package of unlimited Wi-Fi access in all airports for a set monthly price (an increasingly common practice), use of the central antenna will cost airline customers more no matter which of Massport’s four options they choose.

#### **IV. The OTARD Protections Should Apply To All Airport Areas Within Airlines’ Beneficial Use and Control.**

ATA urges the Commission to reject ACI’s contention that Continental’s employees and customers located “in the common area outside the President[s] Club lounge ... are not ‘users’ under the OTARD Rule,” and thus “have no rights” to seek relief from Massport’s efforts to monopolize the use of unlicensed wireless services within Logan Airport.<sup>68/</sup> Such a narrow interpretation of the OTARD rules flatly ignores the technical realities associated with Wi-Fi and other unlicensed wireless services and goes against Commission precedent strongly favoring the “promotion of telecommunications competition and customer choice and the ubiquitous deployment of advanced telecommunications capability.”<sup>69/</sup>

The Commission has previously held that even when a landlord (or others) retains the right to enter areas covered by a tenant’s lease, the tenant has “exclusive use” of those areas for

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<sup>68/</sup> ACI Comments at 20.

<sup>69/</sup> *OTARD First Report and Order* at 23031-32 ¶ 107.

purposes of the OTARD rules where a tenant is the only party that has *beneficial use* of such space.<sup>70/</sup> Under this clear interpretation of the OTARD rules, airlines retain a right to operate their own unlicensed wireless systems not only in their customer lounges, but also in other airport areas (such as boarding gates, cargo ramps, and baggage carousels) in which airlines are the only parties that have “beneficial use” of the space. As the Commission has made clear, this right is protected by the OTARD rules even where there may be other restrictions contained in the lease or elsewhere that place limits on the tenant’s ability to exercise complete control.<sup>71/</sup>

Even if it can be argued that the language of the OTARD rules leaves some uncertainty about the protections afforded to Continental and other airlines to operate their own unlicensed wireless systems in airport areas in which they have “beneficial use,” other statutory provisions both support a finding that the OTARD rules alone provide such protections and provide an independent basis for such protections. In particular, sections 253 and 332 of the Act provide statutory support for a determination that the OTARD protections apply to airlines’ unlicensed wireless services outside of “exclusive use” areas, including some “common” areas in the airport. Section 253(a) of the Act provides that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any

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<sup>70/</sup> See ATA Comments at 13; see also Second Order and Report, *Promotion of Competitive Networks in Local Telecommunications Markets*, 13 FCC Rcd 23874, 23896-97 ¶ 43 (1998) (“OTARD Second Report and Order”) (stating “[w]here the viewer has exclusive use of the property or it is within the viewer’s leasehold, the community association or landlord is already excluded from the space and does not have the right to possess or use it.”)(emphasis added).

<sup>71/</sup> See ATA Comments at 14; see also, e.g., FCC Information Sheet — Over-The-Air Reception Devices Rule (July 2005), available at [www.fcc.gov/mb/facts/otard.html](http://www.fcc.gov/mb/facts/otard.html) (last visited Oct. 11, 2005) (“[I]f the landlord or association regulates other uses of the exclusive use area (e.g. banning grills on balconies), that *does not affect the viewer’s rights under the [OTARD] rule.*”) (emphasis added).

entity to provide any interstate or intrastate telecommunications service.”<sup>72/</sup> As discussed previously, airport authorities are considered to be governmental entities.<sup>73/</sup> Thus, as applied in this context, section 253(a) preempts any restrictions imposed by an airport authority that “not only ‘prohibit’ outright the ability of any entity to provide telecommunications services, but also those that ‘*may have the effect of prohibiting*’ the provision of such services.”<sup>74/</sup>

As the Commission has indicated, when challenging a state or local regulation under section 253, “parties should first describe whether the challenged requirement falls within the proscription of section 253(a); if it does, parties should describe whether the requirement nevertheless is permissible under other sections of the statute, specifically sections 253(b) and (c).”<sup>75/</sup> Here, Massport’s restrictions, based entirely on the existence of its exclusive agreement with AWG, fall squarely within the proscription of section 253. To start, a government entity’s grant of exclusive rights of access to a single telecommunications provider has been held to be a violation of section 253(a).<sup>76/</sup> Massport’s lease-based restrictions, combined with its exclusive contract with AWG, undeniably provide AWG with the exclusive right of access to the market

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<sup>72/</sup> 47 U.S.C. § 253(a).

<sup>73/</sup> See, e.g., *Capital Leasing of Ohio, Inc. v. Columbus Mun. Airport Auth.*, 13 F. Supp. 2d 640, 643 (S.D. Ohio 1998) (An airport authority “is a governmental entity created ... by the City of Columbus, pursuant to the laws of Ohio.”); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 825 F.2d 367, 368 (11th Cir. 1987) (An airport agency that owns and operates an airport is “a local governmental agency created by the Florida legislature.”). As such, Massport’s restrictions regarding Continental’s installation and use of a fixed wireless antenna should be treated as acts of a local governmental entity.

<sup>74/</sup> See *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9<sup>th</sup> Cir. 2001) (citation and internal quotation marks omitted) (emphasis added).

<sup>75/</sup> “Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act,” Public Notice, 13 FCC Rcd 22970 (1998).

<sup>76/</sup> See e.g., *New Jersey Payphone Ass’n v. Town of West N.Y.*, 299 F.3d 235 (3<sup>d</sup> Cir. 2002).

for unlicensed wireless services at Logan Airport. At the same time, Massport's lease restrictions and exclusive contract with AWG violate section 253(a) because (i) the service in question constitutes a "telecommunications service,"<sup>77/</sup> and (ii) the lease provisions in question constitute "legal requirements" within the scope of section 253(a).

The restrictions at issue here clearly constitute "legal requirements" within the scope of section 253(a). Whether imposed through Massport's standard lease provisions or otherwise, the restrictions are of a "regulatory," as opposed to "proprietary" character, and therefore are subject to section 253. The test for whether a local governmental entity's conduct is "proprietary" rather than "regulatory" — and thus exempt from scrutiny under the Act — is "(1) whether the challenged action essentially reflects the entity's own interest in its efficient procurement of needed good and services, as measured by comparison with the typical behavior of private parties in similar circumstances, and (2) whether the narrow scope of the challenged action defeats an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem."<sup>78/</sup> Here, Massport is not procuring a service needed for Logan Airport to operate and provide airport services, thus failing the first prong of this test. Indeed, Massport's ability to act in a proprietary capacity with regard to Wi-Fi services is tightly circumscribed because the law from which it derives its powers requires it to act only in the

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<sup>77/</sup> There is little doubt that the wireless services in question in this proceeding are "telecommunications services." This is true because to the extent that a carrier's private wireless network connects to the Internet (or uses the Internet with a VPN for connection to other wireless service provider's networks), the functions of the wireless network should be considered "telecommunications" that are protected by section 253 of the Act.

<sup>78/</sup> See *Sprint Spectrum v. Mills*, 283 F.3d 404, 420 (2d. Cir. 2002) (citation, internal punctuation, and quotation marks omitted).

public interest.<sup>79/</sup> This restriction reflects the fact that airports are vital hubs of travel and commerce dedicated to the public use.<sup>80/</sup> Indeed, unlike other types of private governmental property, such as an office building, an airport more closely resembles a city, in which numerous business and countless individuals interact on a daily basis. Moreover, unlike the *Omnipoint* and *Sprint* cases, which involved a single contract between a governmental entity and a particular service provider, Massport has a uniform policy of eliminating *all* competition for wireless services at Logan Airport that affects all airlines and their customers — not just Massport. As such, Massport's policy is more akin to regulation than proprietary action.<sup>81/</sup>

Because it is clear that Massport's restrictions fall within the proscription of section 253(a), the only way that they could possibly be upheld is if they were nonetheless permissible under other sections of the Act, in particular sections 253(b) and (c), which they are not. As an initial matter, Massport cannot establish a "safe harbor" under either sections 253(b) or (c) to protect its actions. The safe harbor afforded by section 253(b) generally applies only to States,

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<sup>79/</sup> See Mass. Ann. Laws ch. S73, § 17 (2005) (requiring Massport to act "in *all* respects for the benefit of the people of the commonwealth, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions . . ." (emphasis added)).

<sup>80/</sup> Some cases establish that government entities may impose conditions upon access to their own property without implicating sections 253 or 332 of the Act. See, e.g., *Omnipoint Communications Enterprises v. Township of Nether Providence*, 232 F. Supp. 2d 430, 435 (E.D. Pa. 2002) (township did not have an obligation to lease access to municipal property for a cell cite); *Sprint Spectrum*, 283 F.3d at 412 (because school district "acting as a private property owner, rather than as a municipality in a regulatory capacity," no obligation to afford wireless carrier access to its property).

<sup>81/</sup> See, e.g., *Van-Go Transp. Co. v. New York City Bd. of Educ.*, 53 F. Supp. 2d 278, 288 (E.D.N.Y. 1999) (city school board's actions not proprietary because "the policy at issue extended beyond the parties to a single contract"); *NextG Networks of New York v. City of New York*, 2004 U.S. Dist. LEXIS 25063, No. 03 Civ 9672, at \*19 n.9 (S.D.N.Y. Dec. 10, 2004) (city's franchising scheme involving three thousand city light poles not narrow, proprietary issue).

not local governments.<sup>82/</sup> And more importantly, even if section 253(b) were available to Massport, it only authorizes regulations that impose restrictions on a “*competitively neutral basis*.”<sup>83/</sup> Massport's practice of limiting access to a single provider is not competitively neutral on its face, and therefore cannot be excused under this provision. Likewise, section 253(c) of the Act exempts only competitively neutral regulations and thus has no application to Massport's conduct here.

At the same time, section 332 of the Act also provides statutory support for an interpretation of the OTARD rules that protects the rights of Continental and other airlines to operate their own unlicensed wireless systems in airport areas that are subject to their “beneficial use.” Section 332 limits the ability of local government authorities to interfere with the placement of “personal wireless services facilities.”<sup>84/</sup> Although in *Omnipoint*, the Court stated that “a lease cannot constitute a form of ‘zoning’ or ‘regulation’ governed by [section 332],”<sup>85/</sup> Massport's conduct here is not limited to a single lessee; instead it enforces a uniformly exclusionary policy applicable to *all* would-be providers of unlicensed wireless services at Logan Airport. Thus, Massport's restrictions constitute government regulations within the scope of the Act, rather than merely private actions. Moreover, the term “personal wireless services facilities” is defined broadly to include “commercial mobile services, unlicensed wireless

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<sup>82/</sup> See Memorandum Opinion and Order, *Classic Telephone, Inc.*, 11 FCC Rcd 13082, 13100-01 ¶ 34 (1996).

<sup>83/</sup> 47 U.S.C. § 253(b) (emphasis added).

<sup>84/</sup> 47 U.S.C. § 332(c)(7)(B)(i)

<sup>85/</sup> *Omnipoint*, 232 F. Supp. 2d at 434.

services, and common carrier wireless exchange access services.”<sup>86/</sup> Based on this definition, section 332 of the Act would appear to apply to regulations affecting the placement of antennas for exactly the types of unlicensed wireless services at issue here.

Section 332 of the Act provides in relevant part that “the regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof — (I) shall not unreasonably discriminate among providers of functionally equivalent services — and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”<sup>87/</sup> One federal appeals court has held that an effective prohibition of service “exists whenever a provider is prevented from filling a significant gap in its own service coverage.”<sup>88/</sup> Meanwhile, “providers alleging unreasonable discrimination must show that they have been treated differently from other providers whose facilities are ‘similarly situated’ in terms of the ‘structure, placement or cumulative impact’ as the facilities in question.”<sup>89/</sup> Massport’s decision to grant exclusive access to AWG prevents all other wireless providers from “filling a significant gap in [their] own service coverage.” Likewise, by refusing to grant other wireless providers the same access it has afforded to AWG, Massport unreasonably discriminates against facilities that are “similarly situated” in terms of the “structure, placement or cumulative impact” as the facilities in question.

The OTARD rules, in combination with the protections afforded by sections 253 and 332 of the Act, thus clearly vest in the Commission the authority to invalidate Massport’s restrictions

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<sup>86/</sup> 47 U.S.C. § 332(b)(7)(C)(i).

<sup>87/</sup> 47 U.S.C. § 332(c)(7)(B)(i).

<sup>88/</sup> *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 733 (9th Cir. 2005).

<sup>89/</sup> *Id.* at 727.

on airlines' ability to install and operate their own unlicensed wireless systems not only in their customer lounges, but also in other airport areas in which they have "beneficial use" of the space.

**V. The Commission Possesses Exclusive Authority To Regulate the Installation and Use of Antennas To Provide Wi-Fi and Other Unlicensed Wireless Services**

In its comments, Massport contends that the Commission lacked the statutory authority to expand the scope of its OTARD rules to encompass the provision of "fixed wireless signals" by tenants in multi-tenant environments.<sup>90/</sup> As the Commission has demonstrated twice before,<sup>91/</sup> however, it clearly possesses the authority to extend the OTARD requirements to such services and, accordingly, clearly has the power to grant Continental's petition and declare that Massport's actions, and similar actions by airport authorities across the nation, are invalid. As ATA discussed in its initial comments,<sup>92/</sup> the Commission retains exclusive power to regulate all issues relating to radio frequency emissions. Among other provisions of the Act, sections 2, 301, 302, and 303(c)-(f) demonstrate Congress' express intent to provide the Commission with exclusive jurisdiction over all issues related to the use of radio frequencies, including the ability to resolve disputes arising in connection with the use of unlicensed wireless devices, such as fixed wireless antennas, in multi-tenant environments.

In addition to ignoring the sound basis for the Commission's jurisdiction to regulate the provision of fixed wireless services in multi-tenant environments, Massport relies on a skewed interpretation of the D.C. Circuit's decision in *American Library Association v. FCC*, in which

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<sup>90/</sup> Massport Comments at 67-72.

<sup>91/</sup> See *OTARD First Report and Order*; Order on Reconsideration, *Promotion of Competitive Networks in Local Telecommunications Markets*, 19 FCC Rcd 5637 (2004) ("*Competitive Networks Order on Reconsideration*").

<sup>92/</sup> ATA Comments at 8.

the Court held that the Commission lacked the authority to regulate certain types of consumer electronics products when they are not being used “in the process of radio or wire transmission.”<sup>93/</sup> As is the case with most of Massport’s theories in this proceeding, this argument disregards the very issue at stake — Continental’s and other airlines’ rights to provide unlicensed wireless services within their leasehold areas — in favor of an illogical interpretation of the OTARD rules that only supports Massport’s monopolistic aims. Unlike the regulations at issue in *American Library*, however, the rules in this context specifically address Continental’s rights to install equipment that has no purpose *other than to transmit and receive fixed wireless signals*.<sup>94/</sup> Accordingly, there can be no doubt that enforcing the OTARD rules in this case is within the Commission’s ancillary jurisdiction.

#### **VI. Allowing the Challenged Restrictions To Stand Would Open the Door to Future Efforts To Monopolize the Market for Unlicensed Wireless Services**

As ATA discussed in its initial comments, several of ATA’s members operate or provide access to Wi-Fi hotspots and other wireless technologies using unlicensed spectrum at numerous airports across the nation. Such technologies provide countless benefits to both airline customers and employees, in addition to directly improving airline operations. Unfortunately, the problems that Continental and other airlines are facing at Logan Airport are occurring with increasing frequency in airports across the country. Indeed, as ACI freely admits, one of the primary purposes behind airport authorities’ efforts to establish monopolies on the provision of unlicensed wireless services is because it would be “uneconomical” for them to operate their

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<sup>93/</sup> See *American Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

<sup>94/</sup> As a further indication of the weakness of its argument, Massport’s theory easily could be defeated by ensuring that any unlicensed wireless device is in a transmitting state (*e.g.*, beacon mode) at all times during the installation process.

own wireless networks if airlines and other airport tenants were free to purchase services from the provider of their choice.<sup>95/</sup> Each of these actions effectively deprives airlines and their customers of a choice among competing providers, and in some cases the beneficial use of unlicensed wireless systems, including wireless Internet access, altogether. In addition, these actions severely threaten airlines' ability to operate efficiently and effectively on a daily basis and in times of emergency.

The Commission extended the OTARD rules to cover customer-end antennas such as those at issue in this proceeding that are used for transmitting or receiving fixed wireless signals because "state or local regulations that unreasonably restrict a customer's ability to place antennas used for the transmission or reception of fixed wireless signals impede the full achievement of important federal objectives, including the promotion of telecommunications competition and customer choice and the ubiquitous deployment of advanced telecommunications capability."<sup>96/</sup> Accordingly, the Commission has expressly prohibited the use of exclusive contracts in commercial settings because they "pos[e] a risk of limiting the choices of tenants in [multi-tenant environments] in purchasing telecommunications services, and of increasing the prices paid by tenants for telecommunications services."<sup>97/</sup> Massport and the limited number of commenters that support its position have failed to make the necessary showing under the OTARD rules to sustain the restrictions that Massport and other airport authorities seek to impose on airlines' installation and use of antennas for unlicensed wireless

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<sup>95/</sup> ACI Comments at 15 ("An application of the OTARD rule that gives tenants broad rights to install antennas in a fashion that makes it uneconomical for an airport manager to operate an airport-wide system might constitute [a taking]").

<sup>96/</sup> *OTARD First Report and Order* at 23031-32 ¶ 107.

<sup>97/</sup> *Id.* at 22996-97 ¶ 27.

services. The Commission must remain steadfast in its efforts to enforce its OTARD rules in an even-handed manner that protects the rights of tenants in commercial environments and advances the Commission's policy goals of facilitating the development and deployment of advanced wireless technologies for the benefit of all Americans.

At the same time, at the direction of Congress, one of the Commission's primary policy goals has been to "make available, so far as possible, to all people of the United States ... a rapid, efficient, Nation-wide, and world-wide, wire and radio communications service with adequate facilities at reasonable charges."<sup>98/</sup> In addition, since 1996 the Commission has promulgated countless policies that promote competition and consumer choice among telecommunications providers in order to create "a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies[.]"<sup>99/</sup> And most recently, the Commission has expressed its strong desire to ensure the open and interconnected nature of the public Internet, and in particular has emphasized that "*consumers are entitled to competition among network providers, application and service providers, and content providers.*"<sup>100/</sup> The restrictions Massport and other airport authorities seek to impose threaten each of these policy goals and should not be allowed to stand. If allowed to continue, these restrictions would set a dangerous precedent of placing one group's financial interests above the interests of all of the intended

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<sup>98/</sup> *Competitive Networks Order on Reconsideration* at 5640-41 ¶ 8 (quoting *OTARD First Report and Order* at 23029 ¶ 104).

<sup>99/</sup> S. Rep. No. 104-230, at 1 (1996) (Conf. Rep.).

<sup>100/</sup> See "FCC Adopts Policy Statement: New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet," News Release (rel. Aug. 5, 2005) (emphasis added).

beneficiaries of the Commission's statutory mandate to promote competition and encourage the deployment of advanced wireless services.

### CONCLUSION

The Commission should grant Continental's petition for a declaratory ruling and unequivocally declare that Massport's and other airport authorities' limitations on the ability of ATA's member airlines to deploy unlicensed wireless networks for their own use and use by their customers clearly violate the Commission's rules and thus are unlawful.

Respectfully submitted,



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